

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DELAWARE MARKETING PARTNERS,	)	
LLC.,	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 04-263 ERIE
	)	
CREDITRON FINANCIAL SERVICES,	)	
INC., et al.,	)	
Defendants	)	

HEARING ON DEFENDANTS' MOTION IN LIMINE

Proceedings held before the HONORABLE  
SEAN J. McLAUGHLIN, U.S. District Judge,  
in Judge's Chambers, U.S. Courthouse, Erie,  
Pennsylvania, on Thursday, August 30, 2007.

APPEARANCES:

CHARLES SNYDERMAN, Esquire, (via Phone),  
appearing on behalf of the Plaintiff.

BRETT W. FARRAR, Esquire, (via Phone), appearing  
on behalf of the Plaintiff.

CRAIG A. MARKHAM, Esquire, (via Phone),  
appearing on behalf of the Defendants.

Ronald J. Bench, RMR - Official Court Reporter

1                                    P R O C E E D I N G S

2  
3                    (Whereupon, the proceedings began at 10:00 a.m.,  
4 on Thursday, August 30, 2007, in Judge's Chambers.)  
5

6                    THE COURT: We have the defendants' motion in  
7 limine. Go ahead there, Mr. Markham.

8                    MR. MARKHAM: Thank you, judge. Our motion, of  
9 course, deals with the introduction of evidence of the  
10 plaintiff's entitlement to commissions on revenues which we  
11 received after the contract was terminated by the plaintiff on  
12 January 9, 2004. It's our position, basically, as reflected in  
13 our papers, that after the termination the plaintiff did not  
14 earn any commissions. It did not do any of the work necessary  
15 in order to earn its commissions.

16                   THE COURT: What did it have to do beyond -- let me  
17 ask a couple of preliminary questions. Who drafted this  
18 document?

19                   MR. MARKHAM: The contract was drafted by the  
20 defendants, your Honor.

21                   THE COURT: All right. Was this Mr. Covatto  
22 personally or some other non-lawyer on his behalf, do you know?

23                   MR. MARKHAM: I do not know.

24                   THE COURT: Let me ask this question. If the  
25 plaintiff would not be entitled to its percentage of gross

1 revenues after the termination of the contract in January of  
2 what, 2004?

3 MR. MARKHAM: Yes.

4 THE COURT: Wouldn't that just be a huge windfall to  
5 the defendant who was the breaching party?

6 MR. MARKHAM: No.

7 THE COURT: Why not?

8 MR. MARKHAM: In this contract the plaintiff had to  
9 perform six different -- in order to be entitled to its  
10 commission payments. One of those duties, not the only one,  
11 only one of them, was the procurement of the telemarketing  
12 lists. There were other duties, which included analyzing the  
13 results on the use of the lists. Helping my client to refocus  
14 or ingest its telemarketing activities in regard to  
15 performance, which that is a very important task. As well as  
16 to refine the list for procurement activity. The plaintiff  
17 would submit to the list provider certain criteria of the  
18 universe of people we want to close on. After seeing the  
19 results, the plaintiff would then take the steps necessary to  
20 adjust that to make sure it's done most efficiently to give us  
21 the most, the largest universe of good potential borrowers  
22 here.

23 THE COURT: But unless I'm missing how this works,  
24 isn't the old maxim the proof is in the pudding is applicable  
25 here. If the names they did in fact provide ultimately did do

1 what the hope or end game was and that produced revenue, what  
2 more needed to be done?

3 MR. MARKHAM: There were five other tours and duties  
4 that they agreed to do in this contract after the list was  
5 provided. Their only job was not to provide the list. And  
6 that clearly is stated in this contract. They had other things  
7 they had to do in order to entitle them to payment. If they  
8 didn't, none of these other things, they were not entitled to  
9 what they bargained for. We had bargained for services, in  
10 addition to the provision of lists.

11 THE COURT: Let me ask you this. All those other  
12 services you're talking about, they were services, broadly  
13 speaking, that were designed to enhance the possibility that  
14 the name or names that were supplied would in fact produce  
15 revenue, is that right?

16 MR. MARKHAM: Well, yes, ultimately that was the  
17 goal of the arrangement. Not only revenue, but revenue at the  
18 most cost-efficient manner. To make sure that the work that  
19 was being done focused properly and efficiently, to obtain the  
20 most profitable returns.

21 THE COURT: Let's talk a little bit about the  
22 contract itself here. Now, so I'm clear, it's your position  
23 that paragraph 11(b), which says "both parties shall be  
24 responsible for paying any compensation set forth in program  
25 exhibits through the effective date of termination, including

1 any notice period." Your position essentially is that that  
2 compensation is synonymous with commissions earned, is that  
3 right?

4 MR. MARKHAM: Yes, that is true. The contract  
5 itself, the main body of the contract has a paragraph entitled  
6 "compensation," which is paragraph number 8 of the main  
7 contract. Which indicates that compensation will be  
8 established and agreed upon by a program by program basis and  
9 outlined in program exhibits. And compensation shall include a  
10 share of startup expenses.

11 THE COURT: Here's my question for you on this  
12 11(b). It says both parties shall be responsible for paying  
13 any compensation. But insofar as commissions were concerned,  
14 the only party responsible for paying commissions would have  
15 been your client, right, so doesn't that suggest that  
16 compensation means compensation, and commission means something  
17 else?

18 MR. MARKHAM: No. My client is responsible --

19 THE COURT: Do you understand the upshot of my  
20 question, though. Both parties shall, I'm reading from this  
21 thing, "both parties shall be responsible for paying any  
22 compensation." Only one party under the agreement was  
23 responsible for paying the commission?

24 MR. MARKHAM: Right.

25 THE COURT: So if compensation is synonymous with

1 commission, what sense does it make to refer to both parties?

2 MR. MARKHAM: It's not synonymous. It's the broader  
3 category within which commissions fits. Compensation,  
4 according to paragraph (a), also includes the payment of  
5 startup expenses. And the plaintiff had responsibilities for  
6 paying part of those. So compensation is the broad category  
7 within which a number of different things fit, including  
8 commissions and startup expenses.

9 THE COURT: Okay.

10 MR. MARKHAM: The contract in paragraph 11(b)  
11 reflects the parties agreement that when this contract ends, so  
12 does any obligation to pay anything that fits in the category  
13 of compensation, which would include commissions.

14 THE COURT: Now, if I can find it here, the  
15 plaintiff cites to that, paragraph 11(a), which says that it  
16 doesn't, the termination of the agreement doesn't impair any  
17 rights, obligations or liabilities of Delaware or Telatron that  
18 may accrue or have accrued prior to such termination. And put  
19 a lot of their eggs in that basket. What do you say about  
20 that?

21 MR. MARKHAM: Well, that kind of begs the question  
22 of what has accrued. It's our position that as of the  
23 termination, their rights to commissions on future revenues did  
24 not accrue. And, in fact, under the agreement and by the logic  
25 of it, the plaintiff didn't perform the services necessary

1 after termination that would entitle them to commissions.

2 THE COURT: Haven't I already ruled on that,  
3 essentially, in the liability part of this case?

4 MR. MARKHAM: No, it's completely different. In the  
5 liability part of the case, the question is what is the quality  
6 of what they provided, something that the parties had agreed to  
7 would be -- required before payment was due. Whether they  
8 performed the quality of work is different than here where they  
9 performed no work. And there is no dispute about that. That  
10 after the contract is terminated, not a single thing was done  
11 by them under the agreement. So it's not a question of whether  
12 the contract includes a provision on quality, this contract  
13 includes expressly a provision about what happens on  
14 termination. And there's no question about the fact that they  
15 did nothing after termination, they end the relationship and  
16 did no further work. So it's completely different, a  
17 completely different claim and situation and a completely  
18 different analysis. One that has nothing to do with the other.

19 THE COURT: Finally, the theme that runs through  
20 your paper, just to make it clear on the record, is that  
21 paragraph -- paragraph 11(b) is clear and unambiguous, and your  
22 position is that the contract unambiguously precludes -- a  
23 commission percentage after the termination date?

24 MR. MARKHAM: Yes, that's our position.

25 THE COURT: What do you say about this, Mr. Farrar?

1 MR. FARRAR: There are a number of points in  
2 opposition to, as set forth in our papers. One, there is a  
3 difference between commission and compensation. Inherently in  
4 the document there's a difference between those items. Mr.  
5 Markham, to just say compensation is more broad than commission  
6 and arguing that point, that's just not written anywhere in the  
7 agreement. Compensation is defined in the agreement --

8 THE COURT: But compensation -- bear with me one  
9 second. I'm looking at Exhibit 1. Under allocation of program  
10 revenues, paragraph 4, don't they lump both commission -- they  
11 lump both compensation and commission under that, don't they --  
12 excuse me. 4(b), "Delaware Marketing shall share in the  
13 initial organization expenses." That's the startup costs,  
14 right?

15 MR. FARRAR: Yes.

16 THE COURT: All right. What other "compensation,"  
17 could there possibly be under this agreement, what else could  
18 compensation refer to besides startup costs?

19 MR. FARRAR: Well, that's what's specifically  
20 defined in the agreement as startup costs. But commissions are  
21 not startup costs. I guess that's what we're saying.  
22 Commissions are something that occur after the revenues have  
23 been generated, provided to the defendants, and then there's  
24 distribution of those commissions at that point in time. That  
25 is not a startup cost.



1 THE COURT: I'm just looking at the compensation  
2 section, paragraph 8 that you cite.

3 MR. FARRAR: Yes.

4 THE COURT: It says "specific compensation will be  
5 established and agreed upon on by a program by program basis  
6 and outlined in program exhibits. Included within this  
7 compensation section is Delaware's agreement to share in  
8 startup expenses for each major program undertaken." It says  
9 "included within this compensation section." Does that mean  
10 that there's other items of compensation other than startup  
11 expenses?

12 MR. FARRAR: The way it's drafted, it appears that  
13 would be a fair reading, that yes, there is more than that.

14 THE COURT: What are they?

15 MR. FARRAR: Although, quite frankly, I don't know  
16 what else would be, that happens to be the specific one that's  
17 itemized.

18 THE COURT: Well, let me ask you this, the \$64,000  
19 question. Is this contract read as a whole ambiguous or not?

20 MR. FARRAR: Well, I think, I mean our position in  
21 the papers is that it's not ambiguous with respect to the  
22 commission aspects that we're talking about. If it is  
23 ambiguous, then it would be construed against the drafter,  
24 which is the defendants.

25 THE COURT: What do you say about Mr. Markham's

1 position on accrual. He says, in any event, if you apply  
2 11(a), that which says you are entitled to any benefits that  
3 accrued prior to the termination date, he says your commission,  
4 your entitlement to your percentage of gross proceeds didn't  
5 accrue prior to the termination; what's your position on that?

6 MR. FARRAR: The position on that is that whatever  
7 work that was done that resulted in the revenue being  
8 generated, was done prior to the termination of the agreement.  
9 And at that point in time when the work was performed, which  
10 enabled the revenue to be generated -- a commission right in  
11 that revenue accrued.

12 THE COURT: Say that one more time?

13 MR. FARRAR: Sure. Whatever work was done prior to  
14 the termination of the agreement, that generated a commission  
15 at some point in time, the accrual rights in that commission  
16 occurred prior to the termination, and accrued at a time the  
17 work was done that ultimately resulted in a commission.

18 THE COURT: Accrued at the time the name was sent or  
19 names that were sent on that ultimately proved successful?

20 MR. FARRAR: Yes. Yes, that's right. And because  
21 this idea, again, this idea of this qualitative assessment of  
22 work being done, qualitative, that has already been decided.  
23 That was part of prior motions for summary judgment. At this  
24 point we're talking about the damages. It's assumed that work  
25 was done and we know that revenues were generated. The work

1 that resulted in the gross revenues that they received, is a  
2 right in the commission by the terms of how commission is  
3 defined in this contract, which would have accrued when that  
4 work was done by Delaware Marketing Partners.

5 THE COURT: Let me ask Mr. Markham this and ask a  
6 couple of other factual questions and maybe get to the point  
7 where I can make a ruling on this. What about the Horn book  
8 maxim that if indeed there is an ambiguity here, it's construed  
9 against you?

10 MR. MARKHAM: I don't think there is an ambiguity  
11 here. I mean the reasonable reading of the contract --

12 THE COURT: Are you saying there's not two  
13 reasonable readings of this contract?

14 MR. MARKHAM: Not on the point dealing with whether  
15 they're entitled to revenues, commissions on revenues received  
16 after the termination. The contract is clear on that point,  
17 that they're not. And the ability of one side to kind of  
18 fabricate or argue a different reading, doesn't mean it's  
19 ambiguous.

20 THE COURT: It has to be a reasonable  
21 interpretation?

22 MR. MARKHAM: Right. I think under the  
23 circumstances and the language used, it makes it clear that  
24 right to compensation -- that compensation is defined to  
25 include things other than startup costs.

1 THE COURT: Did Mr. Covatto negotiate the agreement  
2 on behalf of the defendant?

3 MR. MARKHAM: I believe he did.

4 THE COURT: Who, on behalf of your client, Mr.  
5 Farrar, was involved in the back and forth on this contract?

6 MR. FARRAR: I think it was Brian Nelson, and I  
7 believe he signed it. And probably also would have included  
8 Harry Metcalfe. Brian Nelson is the person who signed the  
9 document.

10 THE COURT: As both of you sit here, I'm not  
11 suggesting this is the way it would go, I'm trying to get the  
12 big picture here, let me direct this to Mr. Farrar first. If  
13 this were a parole evidence case, is there parole evidence,  
14 that you are aware of or you would intend to present, that  
15 would shed light on the alleged ambiguity, I said alleged  
16 ambiguity, as to whether or not you were entitled to  
17 commissions post-termination?

18 MR. FARRAR: Assuming that alleged ambiguity?

19 THE COURT: Yes.

20 MR. FARRAR: Could I ask the court a question?

21 THE COURT: Sure.

22 MR. FARRAR: I guess if you could be a little  
23 clearer, what type of evidence?

24 THE COURT: Let me put it this way. Let's assume  
25 for the sake of discussion as once I get to the end of this

1 argument and have an opportunity to reflect on this a little  
2 bit, there's only two ways I can go here. Either I construe  
3 the contract as unambiguous and therefore in favor of one side  
4 here. Or I find under Pennsylvania rules of contract  
5 construction that there is an ambiguity and that is to say that  
6 both sides interpretation is reasonable. If I were to find  
7 that, then the appropriate approach is to leave that issue up  
8 to the jury but permit both sides, as is appropriate in a  
9 parole evidence case, to present evidence, be it documentary or  
10 testimonial, as to what the parties' intent was. My question  
11 is, assuming that this case went to a jury on that issue, do  
12 you have, would you have testimony or documentary evidence that  
13 you would present that would buttress your position that your  
14 interpretation was reasonable?

15 MR. FARRAR: I think the parties would testify, not  
16 the parties, either Mr. Nelson or Mr. Metcalfe would testify  
17 that it was their understanding that they would be paid  
18 whatever commissions came in within a seven-day time period.

19 THE COURT: Irrespective of the termination?

20 MR. FARRAR: Right. That's what -- I mean, really  
21 that's what ultimately, that's what this case is about. You  
22 know what I mean.

23 THE COURT: Right. What about you, Mr. Markham?

24 MR. MARKHAM: Well, I would anticipate that Mr.  
25 Covatto would testify about his understanding, I guess even in

1 the absence of testimony if it's ambiguous, the jury could  
2 reach its own conclusions I guess based upon the context of the  
3 agreement. Although, I have not talked to him specifically  
4 about whether there were give and take discussions on this  
5 precise point, certainly since he drafted it, he had something  
6 in mind.

7 THE COURT: Let's go off the record for a second.

8 (Discussion held off the record.)

9 THE COURT: Let's go back on the record and talk  
10 about this a little bit. What documents are you talking about?

11 MR. MARKHAM: I'm told from plaintiff's counsel,  
12 principally Mr. Snyderman, that they have taken some of the  
13 data produced in discovery and have submitted it to third  
14 parties for analysis and comparison as to permit them to prove  
15 that lists provided before termination that resulted in a  
16 specific dollar revenue after termination. And he's working on  
17 getting that to me, but he hasn't done so yet. I don't know  
18 whether it's available to him or not available to him.

19 THE COURT: Is this in the nature of an expert  
20 report?

21 MR. MARKHAM: I don't know if it's expert reports, I  
22 don't know what it is, frankly. Other than some third party is  
23 doing or has done this comparison analysis of some kind.

24 THE COURT: What will it reportedly show?

25 MR. MARKHAM: It will show that X dollars in revenue

1 was received by us through our use of telemarketing lists which  
2 were provided by the plaintiff prior to contract termination.

3 THE COURT: So you're waiting for that?

4 MR. MARKHAM: I'm waiting for that.

5 THE COURT: What do you know about that, Mr. Farrar?

6 MR. FARRAR: Mr. Snyderman is the individual who is  
7 putting that together.

8 THE COURT: The short answer is you really don't  
9 know much about it, you don't know anything about where it is  
10 or when he's supposed to get it?

11 MR. FARRAR: No, I do not.

12 THE COURT: First of all, on the main point that  
13 brought us here today, is there anything else that anybody  
14 needs to say about that or do you feel you got your say?

15 MR. MARKHAM: Nothing from us, your Honor.

16 THE COURT: Then let me do this. I want to take a  
17 few minutes and take a look at my notes and glance at the  
18 briefs. Are both of you going to be at your desks there for  
19 the next 15 or 20 minutes?

20 MR. MARKHAM: Yes.

21 MR. FARRAR: Yes.

22 THE COURT: Who initiated this call?

23 MR. MARKHAM: I did, your Honor.

24 THE COURT: All right, would you ring back about  
25 ten to 11, at that point I ought to be able to get a ruling on

1 the record here. In the meantime, Mr. Farrar, if possible,  
2 make an effort so can we patch Mr. Snyderman in here.

3 MR. FARRAR: I'm going to make every effort I can to  
4 do that.

5 THE COURT: I think that would be very helpful. All  
6 right, thank you.

7 (Recess from 10:26 a.m.; until 10:50 a.m.)

8 THE COURT: This is the judge, do I have Mr.  
9 Snyderman on the line?

10 MR. SNYDERMAN: Yes, your Honor.

11 THE COURT: Counsel, the first thing I'm going to do  
12 is get an order on the record, then we're going to talk about  
13 where we go from here. This is an order.

14 ORDER

15 Presently pending before the court is the  
16 defendants' motion in limine. The background to this matter is  
17 well-known to the parties, so I'm not going to recite it in any  
18 detail now. Suffice it to say, the court previously granted  
19 summary judgment in favor of Delaware Marketing on the issue of  
20 liability. The defendant now seeks an order preventing the  
21 plaintiff from recovering its commission on moneys received by  
22 the defendant after the contract was terminated on January 9,  
23 2004. The defendants' position as set forth in its papers and  
24 I'm quoting, it is essentially as follows:

25 "The Agreement provides that either party may



1 terminate the contract due to a material breach of  
2 the Agreement. Agreement, paragraph 10(a)(iv). The  
3 contract also deals expressly with the issue of  
4 compensation owed to the plaintiff upon such a  
5 termination.

6 11. RESPONSIBILITIES UPON TERMINATION ...

7 (a) ...

8 (b) Both parties shall be responsible for paying  
9 any compensation set forth in the Program Exhibits  
10 through the effective date of termination (including  
11 any notice period). Payment shall be described in  
12 Section 8 above."

13 The defendant then continues:

14 "It is the plaintiff's position that, despite this  
15 clear contractual limitation, the plaintiff is  
16 entitled to full commissions for those revenues  
17 received by defendants after the termination.  
18 However, plaintiff cannot point to any express  
19 contract provision which provides such a right.  
20 The court would have to not only add provisions to  
21 the contract, but it would also have to ignore  
22 paragraph 11(b) of the Agreement (or conclude that  
23 this provision is meaningless) in order to grant the  
24 plaintiff the relief it demands."

25 And that's at defendants' brief pages 5 and 6.

1 Finally, the defendant concludes:

2 "The Agreement states that compensation is to be  
3 paid up 'through the effective date of termination.'  
4 The reasonable reading of this contractual  
5 limitation is that no compensation is owed unless  
6 the right to compensation has accrued before the  
7 date of termination." That's at page 6 of  
8 defendants' brief.

9 The defendant argues that the right to compensation  
10 has not accrued because defendant had not actually received the  
11 revenues.

12 Plaintiff, on the other hand, argues that when the  
13 contract is read as a whole, it unambiguously supports its  
14 contention that it is entitled to its share of all commissions  
15 generated even after the effective date of termination. In  
16 this regard plaintiff points to paragraph 11(a) of the  
17 Agreement, which provides in pertinent part:

18 "The termination of this Agreement, however  
19 occasioned, shall not terminate, affect or impair  
20 any rights, obligations or liabilities of Delaware  
21 Marketing or Telatron that may accrue or have  
22 accrued prior to such termination or that, under the  
23 terms of this Agreement, continue after the  
24 termination. Each party shall return all  
25 property and confidential information belonging

1 to the other party which is in its possession at the  
2 time of termination." Plaintiff's brief, page 4.

3 The plaintiff argues, essentially, that the  
4 defendant confuses the concept of compensation and distributed  
5 commission funds. Specifically, plaintiff argues as follows:

6 "Defendants argue that paragraph 11(b) of the  
7 Agreement prevents Delaware Marketing Partners, LLC  
8 from recovering 28.57 percent of all gross revenues  
9 received by defendants after January 9, 2004, the  
10 date of the termination of the Agreement, arising  
11 from services provided by Delaware Marketing  
12 Partners, LLC. Paragraph 11(b) states, in relevant  
13 part: 'Both parties shall be responsible for paying  
14 any compensation set forth in the Program Exhibits  
15 through the effective date of termination (including  
16 any notice period).' Contrary to defendants'  
17 argument, this provision says nothing about limiting  
18 Delaware Marketing Partners, LLC's right to payment  
19 of its 28.57 percent gross revenue amount. In fact,  
20 when reading paragraph 11(b) together with paragraph  
21 11(a), as this court should do, it is readily  
22 apparent that 11(b) merely supplements 11(a) and  
23 that 11(a) actually controls this damage dispute.  
24 Paragraph 11(a) controls the parties' relationship  
25 post-termination, while 11(b) addresses the narrow

1 issue of compensation during performance of the  
2 Agreement through the effective date of termination.  
3 Defendants' argument which relies upon paragraph  
4 11(b) is without merit."

5 Finally, the plaintiff argues relative to the  
6 alleged difference between compensation and commission as  
7 follows:

8 "Defendants confuse the term 'compensation' found in  
9 paragraph 11(b) with the concept of distributing  
10 commission funds regarding gross revenues found at  
11 paragraph 4 of Exhibit-001 of the Agreement.

12 'Compensation' under the Agreement is discussed in  
13 paragraph 11(b) and paragraph 8. (Exhibit 1, pages  
14 4 and 5). In paragraph 8 the only cost specifically  
15 relating to the payment of compensation is startup  
16 expense. Further, paragraph 8 states that startup  
17 expense should be deducted from future commissions,  
18 thereby indicating that startup expense, the only  
19 item identified in connection with compensation, is  
20 something different than commissions. (Exhibit 1,  
21 paragraph 8). Clearly, the contract contemplates  
22 that compensation and commissions are two different  
23 things; compensation being the payment of money that  
24 each party owes to the other in exchange for work  
25 done, specifically including connection with startup

1 expense, and commission being moneys shared between  
2 the parties derived gross revenues received from  
3 operation of the program with 28.57 percent of gross  
4 revenues distributed to Delaware Marketing Partners,  
5 LLC." That is plaintiff's brief, pages 6 and 7.

6 The law in Pennsylvania relative to the issue of  
7 contract interpretation was succinctly summarized in  
8 Bohler-Uddeholm America, Inc. v. Ellwood Group, 247 F.3d 79  
9 (3rd Cir. 2001) as follows:

10 "Under Pennsylvania law on contract interpretation  
11 and ambiguity is somewhat complicated; while the  
12 broad principles are clear, it is not a seamless  
13 web, and hence we will have to review some of the  
14 relevant Pennsylvania cases before applying the law  
15 to the facts at bar. Pennsylvania contract law  
16 begins with the 'firmly settled' point that 'the  
17 intent of the parties to a written contract is  
18 contained in the writing itself'." Krizovensky v.  
19 Krizovensky, 425 Pa.Super. 204 (1993). Citing  
20 Steuart v. McChesney, 498 Pa. 45 (1982). "'Where  
21 the intention of the parties is clear, there is no  
22 need to resort to extrinsic aids or evidence,'  
23 instead, the meaning of a clear and unequivocal  
24 written contract 'must be determined by its contents  
25 alone'." Steuart, 444 A.2d at 661. "Where language

1 is clear and unambiguous, the focus of  
2 interpretation is upon the terms of the agreement as  
3 manifestly expressed, rather than as, perhaps,  
4 silently intended." Id. "Clear contractual terms  
5 that are capable of one reasonable interpretation  
6 must be given effect without reference to matters  
7 outside the contract." Krizovensky, 624 A.2d at  
8 642.

9 The Bohler court also observed:

10 "A court may, however, look outside the 'four  
11 corners' of a contract if the contract's terms are  
12 unclear: 'Where the contract's terms are ambiguous  
13 and susceptible of more than one reasonable  
14 interpretation ... the court is free to receive  
15 extrinsic evidence, i.e., parole evidence, to  
16 resolve the ambiguity'." Id. "But because  
17 Pennsylvania law presumes that the writing conveys  
18 the parties' intent, a contract will be found  
19 ambiguous if, and only if, it is a reasonably or  
20 fairly susceptible of different constructions  
21 and is capable of being understood in more senses  
22 than one and is obscure in meaning through  
23 indefiniteness of expression or has a double  
24 meaning. A contract is not ambiguous if the court  
25 can determine its meaning without any guide other

1 than a knowledge of the simple facts on which, from  
2 the nature of the language in general, its meaning  
3 depends; and a contract is not rendered ambiguous  
4 by the mere fact that the parties do not agree on  
5 the proper construction." Citing Duquesne Light Co.  
6 v. Westinghouse, 66 F.3d 604. "To determine whether  
7 ambiguity exists in a contract, the court may  
8 consider 'the words of the contract, the alternative  
9 meaning suggested by counsel, and the nature of the  
10 objective evidence to be offered in support of that  
11 meaning'." Mellon Bank, NA v. Aetna Business  
12 Credit, 619 F.2d 1001, 1011 (3rd Cir. 1980). That's  
13 at pages 92 and 93.

14 Here, based upon a careful review of the contract,  
15 as well as the written submissions by the parties, in addition  
16 to the oral argument, I find consistent with the above rules of  
17 contractual construction that the contract is not ambiguous and  
18 that the interpretation put forward by the plaintiff is the  
19 only reasonable interpretation.

20 I find this for a number of reasons. First, the  
21 defendants' interpretation, in my view, would represent a  
22 windfall to the breaching party in this case. That is to say  
23 after having supplied the names which subsequently resulted in  
24 student loans and therefore commissions, it would represent a  
25 windfall if defendant were permitted to retain one-hundred

1 percent of the revenues without accounting for 28.57 percent of  
2 the gross revenue.

3 Further, I find under the contract that there is a  
4 difference between "compensation" and "commissions." Paragraph  
5 8 of the contract specifically references that startup expense  
6 should be deducted from future expenses, future commissions,  
7 rather, then reinforcing the concept that the two terms have  
8 different meanings. Moreover, I note that paragraph 11(b) of  
9 the contract states that "both parties shall be responsible for  
10 paying any compensation. Indeed, since only the defendant was  
11 responsible for paying plaintiff its commission, it further  
12 demonstrates that the term "compensation" does not subsume the  
13 term "commission funds."

14 For all of the above reasons, I find that the  
15 defendants' motion in limine should be denied.

16 Now, Mr. Snyderman, before you got on the phone  
17 here, I was talking to these fellows, specifically Mr. Markham,  
18 and Mr. Markham says that he has been awaiting a document from  
19 you that is important to the damage issue. Mr. Markham, rather  
20 than me try to say what it is, why don't you do it?

21 MR. MARKHAM: Okay. My understanding is that the  
22 plaintiff has engaged a third party to conduct some type of  
23 analysis --

24 THE COURT: We're getting a bad hum from your phone,  
25 are you on a speaker phone or a regular line or what?



1 MR. MARKHAM: I'm on a regular line.

2 THE COURT: Well, try to keep your voice up. Go  
3 ahead, Mr. Markham.

4 MR. MARKHAM: It is my understanding that the  
5 plaintiff has engaged the services of a third party to conduct  
6 some type of analysis on data that the plaintiff will attempt  
7 to prove what revenues post-termination were derived from lists  
8 provided after termination. Which is now one of the main  
9 centerpieces of what remains of the case. I haven't received  
10 those documents or whatever that information may be.

11 THE COURT: All right. What about it, Mr.  
12 Snyderman?

13 MR. SNYDERMAN: Your Honor, I don't have it yet,  
14 either.

15 THE COURT: It's getting pretty late in the day.

16 MR. SNYDERMAN: Well, Mr. Markham has the same  
17 information, the same data that I have. And the issue is  
18 simply matching what's in one list to what's on another list.

19 THE COURT: This isn't expert testimony --

20 MR. SNYDERMAN: It's not expert testimony. Your  
21 Honor, I might add that it would be, except for the fact that  
22 the volume is larger, it's no different than having a list on  
23 one piece of paper containing names and a list on another piece  
24 of paper having names and showing which names are identical on  
25 the same two pieces of paper.

1 THE COURT: It's just a more extensive mechanical  
2 exercise, is that what you're telling me?

3 MR. SNYDERMAN: Yes, your Honor.

4 THE COURT: Well, do you have the raw data, Mr.  
5 Markham?

6 MR. MARKHAM: I don't know. I haven't seen his  
7 comparison, I haven't seen what documents he intends to offer,  
8 in addition to the raw data. They're not able to make those  
9 comparisons.

10 THE COURT: Put it this way. If you have the raw  
11 data and if he has the raw data and if he's simply farther  
12 ahead of the curve in terms of making the analysis complete,  
13 that's one thing. If it should come to pass for some reason  
14 you haven't been given data that he has, well then, that's  
15 something else. For present purposes I'd simply say this. And  
16 this is, to state the obvious. Your ability, Mr. Snyderman, to  
17 put on proof relative to any aspects of your damage is going to  
18 depend in part upon whether the necessary information upon  
19 which the calculation was made was shared with the defendant.  
20 Now you're telling me that, to your knowledge, you have shared  
21 everything with the defendant that you have in your possession,  
22 is that what you're telling me?

23 MR. SNYDERMAN: Yes. For Mr. Markham's benefit, I  
24 can point out what we're talking about, the subpoena to PHEA  
25 and the documentation we received from PHEA was certainly

1 provided to Mr. Markham. And Mr. Markham's client certainly  
2 knows what names we've supplied to them because they had the  
3 names and used them. That's all the information we're talking  
4 about.

5 THE COURT: Then --

6 MR. MARKHAM: I'm not sure if I have the PHEA  
7 documents that you got by subpoena.

8 THE COURT: What I'm going to tell you folks to do  
9 is when we get off the phone here, you spend some time on the  
10 phone yourself and simply confirm that. Under the general  
11 rubric that a word to the wise is sufficient. I would simply  
12 encourage the plaintiff to make sure the defendant, to the  
13 extent that you can, Mr. Snyderman, that you're both on the  
14 same wavelength, that he in fact has what you have and in your  
15 possession upon which you based your damage calculations. All  
16 right. Now, that having been said, let me turn to the issue of  
17 the trial on Tuesday. From your perspective, Mr. Snyderman --  
18 what facts am I going to have a jury brought all the way from  
19 the 13 counties in northwest Pennsylvania come in and what  
20 material facts are they going to pass on?

21 MR. SNYDERMAN: May I say that we're perfectly  
22 willing to have this tried by the court without a jury.

23 THE COURT: I know, the court isn't willing to do  
24 that.

25 MR. SNYDERMAN: I sorry, I didn't know that.

1 THE COURT: Let's just say hypothetically, whatever  
2 fact finder would do the fact finding, what fact finding is  
3 there to do?

4 MR. SNYDERMAN: The only fact finding would be  
5 coming up with the total amount of gross revenues which the  
6 defendants received after January 9th or 10th, 2004. Which  
7 resulted from names that Delaware Marketing Partners supplied  
8 before that date.

9 THE COURT: Do both sides already agree on the  
10 amount of revenues that were generated prior to January 9,  
11 2004?

12 MR. SNYDERMAN: I believe so, your Honor. Your  
13 Honor, I believe we're also in agreement on the total gross  
14 revenues received and through January 9th, the only issue is  
15 did the revenue that the defendants received after that date  
16 come from defendants' own efforts, in other words, using names  
17 that we didn't supply or what portion of it was from the names  
18 we did supply.

19 THE COURT: You perceive that is perhaps a factual  
20 dispute?

21 MR. SNYDERMAN: Yes, your Honor.

22 THE COURT: Do you as well, Mr. Markham?

23 MR. MARKHAM: Yes, I think we haven't talked about  
24 what were relatively minor issues dealing with startup cost and  
25 things like that.

1 THE COURT: That's the big issue, that is how you  
2 see it as well?

3 MR. MARKHAM: Yes.

4 THE COURT: What are the subsidiary minor issues  
5 that might impact on the damage claim, what other issues need  
6 to be addressed?

7 MR. SNYDERMAN: Well, your Honor, we're going to  
8 show that due to the fact -- paid all the front expenses, they  
9 were deducted from the commissions we received in the  
10 beginning. But there is one other damage issue that, as the  
11 defendants had agreed to reimburse the plaintiff for some of  
12 its expenses in connection with direct mail campaigns. The  
13 plaintiff actually sent the defendant an invoice, maybe two  
14 invoices and they have never been paid.

15 THE COURT: How much money are we talking about for  
16 this discreet item of damage?

17 MR. SNYDERMAN: Less than \$100,000.

18 THE COURT: What's the defendants' position on that  
19 item of damage, alleged damage?

20 MR. MARKHAM: Well, they're entitled to  
21 reimbursement of part of the mailing expense. It's a question  
22 of whether it has been factored into the overall calculation of  
23 damages.

24 THE COURT: Is it conceivable that with respect to  
25 that discreet, albeit much smaller claim loss, you might be

1 able to come to some kind of agreement on that figure?

2 MR. MARKHAM: I mean it's possible, sure.

3 THE COURT: Explore that, that will be the second  
4 issue. Is there yet a third discreet item of damage that we  
5 need to talk about or does that pretty much cover it?

6 MR. SNYDERMAN: Your Honor, I believe that covers  
7 it.

8 THE COURT: All right. Now, what I'm going to need,  
9 I got some points for charge from you or suggested jury  
10 instructions. I'm not being critical when I say this because  
11 you didn't really know how this thing was going to be teed up  
12 until right now. Those aren't very, in fact those aren't  
13 useful to me at all. I would suggest that both sides and I'm  
14 going to give you an opportunity to submit new requested jury  
15 instructions consistent with the ruling that has been made and  
16 the discussion about damages we just had. And I'd like you to  
17 get those in before the end of the business day tomorrow. I  
18 already have your voir dire. So that's that. Now, let's go  
19 off the record.

20 (Discussion held off the record.)

21 THE COURT: Then we will see you -- are you trying  
22 this case, Mr. Snyderman?

23 MR. SNYDERMAN: Yes, your Honor.

24 THE COURT: I will see you here, I'd like you here  
25 in my chambers at a quarter to nine. I'll take up the voir

1 dire questions and any other dangling issues that anybody needs  
2 to call to my attention. And as I said at the beginning of our  
3 discussion, I encourage you to, when we get off the phone, to  
4 make sure Mr. Markham is on the same page in terms of these  
5 damage documents. That having been said, does anybody have  
6 anything else they need to call to my attention -- then we'll  
7 see you on Tuesday. Thank you, counsel.

8  
9 (Whereupon, at 11:16 a.m., the proceedings were  
10 concluded.)

11  
12 - - -  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read 'Ronald J. Bench', is written over a horizontal line.

Ronald J. Bench